No. 93-320

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In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL G. KEOUGH, ACTING REGIONAL ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REGION I, PETITIONER

v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN RESPONSE TO RESPONDENT'S MEMORANDUM SUGGESTING MOOTNESS

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The Solicitor General, on behalf of the Acting Regional Administrator of the United States Environmental Protection Agency, Region I, files this reply to the Memorandum of Respondent, American Policyholders Insurance Company, Suggesting a Question of Mootness.

1. On December 20, 1991, respondent, American Policyholders Insurance Company (API), filed suit in the Superior Court for Middlesex County, Massachusetts, against three of its policyholders, Daniel S. Greenbaum, in his capacity as the Commissioner of

the Massachusetts Department of Environmental Protection (DEP), and Julie Belaga, in her capacity as the Regional Administrator of EPA Region I (Regional Administrator). The complaint sought a declaratory judgment relieving API from defending or indemnifying the policyholders for any claims that EPA or DEP might make against them under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*, or under state law for hazardous waste contamination at a site in Ashland, Massachusetts. The complaint stated that the Regional Administrator and the Commissioner of DEP were "named as parties solely to fulfill the requirements of Massachusetts common law that the underlying claimants be bound by any declaration entered between an insurer and its insured." C.A. App. 10; Pet. 3.

2. In January 1992, the Regional Administrator removed the action to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. 1441 and 1442.[1] Pet. 3-4. In May 1992, the

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[1] 28 U.S.C. 1441(a) provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. 1442(a)(1) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United

district court dismissed API's claims against the Regional Administrator pursuant to Fed. R. Civ. P. 12(b)(6). API appealed the order of dismissal to the United States Court of Appeals for the First Circuit. In the meantime, the district court remanded the remaining claims to state court. Pet. 4-5.

3. Relying principally upon *International Primate Protection League* v. *Administrators of Tulane Education Fund*, 111 S. Ct. 1700 (1991), the First Circuit held that the Regional Administrator lacked the authority to remove this action pursuant to the federal officer removal statute, 28 U.S.C. 1442(a)(1), because she had been sued exclusively in her official capacity, rather than in her individual capacity. Pet. App. 10a. It further held that removal was not proper under 28 U.S.C. 1441. Pet. App. 10a-11a. It accordingly vacated the district court's order of dismissal and directed the district court on remand to reinstate the Regional Administrator as a defendant and to remand API's claim against her to the state court. Pet. App. 16a-17a. The First Circuit subsequently denied the Regional Administrator's petition for rehearing and suggestion of rehearing en banc. *Id.* at 25a-28a, 29a.

4. On August 26, 1993, the Solicitor General, on behalf of the Acting Regional Administrator, filed a petition for a writ of certiorari presenting the following question (Pet. I):

States for the district and division embracing the place wherein it is pending:

> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *.

May an officer of the United States remove a civil action under Section 1442(a)(1) when he or she is sued exclusively in his or her *official* capacity, or does Section 1442(a)(1) apply only when an officer is sued in his or her *individual* capacity?

5. On October 1, 1993, API filed a Notice of Voluntary Dismissal in state court dismissing the Acting Regional Administrator from this case pursuant to Rule 41(a) of the Massachusetts Rules of Civil Procedure.[2]

6. On October 21, 1993, API filed a memorandum suggesting mootness in this Court.

ARGUMENT

Respondent suggests that this case is moot in light of its voluntary dismissal of the Acting Regional Administrator from the case. We infer from respondent's voluntary dismissal and its suggestion of mootness that it does not intend to renew its claim

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[2] Mass. R. Civ. P. 41(a)(1) provides in pertinent part:

> Subject to the provisions of these rules and of any statute of this Commonwealth, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs * * *. Unless otherwise stated in the notice of dismissal * * *, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action based on or including the same claim.

At the time that API filed its Notice of Voluntary Dismissal, the Acting Regional Administrator had not filed an answer or a motion for summary judgment.

against the Acting Regional Administrator (or any of his successors in office) at a future stage of this litigation or in any future action. If that understanding is correct, we agree that this case is moot. We disagree, however, with respondent's contention that the petition should be denied. Rather, in accordance with its established practice, the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals for entry of an order directing the district court to dismiss respondent's claim against the Acting Regional Administrator with prejudice.

1. In *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), this Court stated that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." See also *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 n.* (1979) (per curiam) (*Munsingwear* is "perhaps the leading case on the proper disposition of cases that become moot on appeal"). In accordance with that "established practice," the Court has repeatedly emphasized that "[w]hen a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint." *Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988); see *Honig* v. *Doe*, 484 U.S. 305, 329 (1988) (Rehnquist, C.J., concurring) (*Munsingwear* "has been followed fairly consistently over the last 30 years").

There is no reason for the Court to depart from its settled practice in the present case. The Court has followed *Munsingwear* when, as here, a case has become moot as a result of unilateral conduct by the party who prevailed in the court below. *Deakins*, 484 U.S. at 199-200; see also *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 512-513 (1989); *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225, 227 (1989) (per curiam); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 329 (1961). The Court has also followed *Munsingwear* when, as here, a case has become moot while a petition for a writ of certiorari is pending. See, *e.g.*, *Sale* v. *Haitian Centers Council, Inc.*, 113 S. Ct. 3028 (1993); *Sivley* v. *Soler*, 113 S. Ct. 454 (1992); *Yellow Freight Sys., Inc.* v. *United States*, 113 S. Ct. 31 (1992); *Clarke* v. *Ross*, 111 S. Ct. 2882 (1991).

We have argued in previous cases that, in the latter situation—*i.e.*, when a case becomes moot while a certiorari petition is pending—certiorari should be denied if the case is not one that would have warranted review on the merits. See 77-900 U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978); see also 92-1123 U.S. Br. as Amicus Curiae Supporting Respondents at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.* (argued Oct. 12, 1993). In this case, however, further review on the merits would be warranted for the reasons set forth in our petition (at 7-22).

2. If this Court agrees with us that a *Munsingwear* order is appropriate, the Court should specify in the order that on remand, the court of appeals should direct the district court to enter an order dismissing

respondent's claim against the Acting Regional Administrator with prejudice. A dismissal with prejudice is necessary to prevent respondent from renewing its claim against the Acting Regional Administrator (or any of his successors in office) in this or a future action.

This Court followed that course under similar circumstances in *Deakins*. The petitioners there were New Jersey law enforcement officers who seized documents from the respondents' business office under a search warrant issued in a state grand jury investigation. *Deakins*, 484 U.S. at 195-196. The respondents sued the petitioners in federal court under 42 U.S.C. 1983, seeking damages and an injunction requiring petitioners to return the documents. *Id.* at 196-197. After this Court granted certiorari to determine whether the district court was required to abstain from adjudicating the respondents' claims for equitable relief under *Younger* v. *Harris*, 401 U.S. 37 (1971), the respondents filed a memorandum suggesting mootness, and they told the Court that they did not wish to pursue those claims in federal court and would amend their federal-court complaint to omit the claims. *Deakins*, 484 U.S. at 197-199. The petitioners argued that the respondents' promise to amend their complaint to withdraw their claims for equitable relief did not render the case moot, because "nothing will prevent respondents * * * from nullifying that amendment by further amendment or from filing a new complaint" renewing their claims, and that the district court would refuse to abstain from adjudicating those claims in light of the court of appeals' prior holding that abstention was not appropriate. *Id.* at 199-200. The petitioners contended that

"this potential for manipulation render[ed] the case 'capable of repetition, yet evading review,' and should therefore shield it from a conclusion of mootness." *Id.* at 200.

This Court rejected the petitioners' argument, finding that it "misconceived" the effect that respondent's withdrawal of their claims "will have on the shape of the federal litigation." *Deakins*, 484 U.S. at 200. The Court explained (*ibid.*):

> When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). This disposition strips the decision below of its binding effect. And respondents can be prevented from reviving their claims by the order of dismissal. Because this case was rendered moot in part by respondents' willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated. This will prevent the regeneration of the controversy.

The Court accordingly held that "respondents' claims for equitable relief are moot," and it "vacate[d] the portion of the Court of Appeals' judgment addressing those claims and remand[ed] with instructions to dismiss the claims for equitable relief with prejudice." *Id.* at 204.

The present case, like *Deakins*, presents a "potential for manipulation" that can be avoided by a *Munsingwear* order specifying a dismissal with prejudice. In the absence of such an order, respondent

could, having dismissed its claim against the Acting Regional Administrator without prejudice, renew that claim by amending its complaint in this case at a later stage of the proceedings or by filing a new complaint. If the Acting Regional Administrator then removed the action to federal district court, the district court would be bound by the judgment of the court of appeals to remand the action to state court. That scenario would render the question presented here "capable of repetition, yet evading review," and therefore not moot, but for "[t]he Court's ability to prevent respondent[] from renewing [its] claim[]" by entering a *Munsingwear* order providing that respondent's claim against the Acting Regional Administrator "is dismissed with prejudice." *Deakins*, 484 U.S. at 200-201 n.4.[3]

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[3] In contrast to the respondents in *Deakins*, 484 U.S. at 199, respondent API has not expressly represented to this Court that it will not renew its claim against the Acting Regional Administrator at a later stage of this proceeding or in a future proceeding. As explained earlier, pp. 4-5, *supra*, however, we believe that such a representation is implicit in respondent's voluntary dismissal of its claim against the Acting Regional Administrator and its suggestion that this case is moot. If our understanding is correct, then respondent can have no basis for objecting to a dismissal with prejudice. If, on the other hand, respondent has not ruled out the possibility of renewing its claim against the Acting Regional Administrator, then this case would not be moot. In that event, there would be a reasonable likelihood that the conduct on which our petition is based—*i.e.*, respondent's maintenance of a claim against the Regional Administrator based on the possibility that EPA might take action against respondent or its policyholders in connection with the Ashland site—would recur. Cf., *e.g.*, *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) ("[m]ere voluntary cessation of allegedly illegal conduct does

CONCLUSION

For the reasons set forth above and in our petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for entry of an order directing the district court to dismiss respondent's claim against the Acting Regional Administrator with prejudice.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1993

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not moot a case"); accord *Northeastern Florida Chapter of the Associated General Contractors of America* v. *Jacksonville*, 113 S. Ct. 2297, 2301 (1993); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Accordingly, if respondent is unwilling to be precluded from renewing its claim against the Acting Regional Administrator (or any of his successors in office), then the Court should reject respondent's suggestion of mootness and grant the petition.